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In the Supreme Court
OF THE
United States

OCTOBER TERM 1974

No. 74-890

ROBERT G. DUDLEY and MARI A. DUDLEY,
Petitioners,

vs.

D. DEJERSEY GRUT; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION; THE FIRST NATIONAL BANK OF SAN JOSE; COAST MANUFACTURING CO.; FIRESIDE THRIFT CO.; REICHHOLD CHEMICAL CO., aka RICHHOLD CHEMICAL CO.; JOE DOE I through X, and RICHARD ROE CORPORATIONS, I through X,
Respondents.

RESPONDENT BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Petition for Writ of Certiorari sets forth the unpublished opinions below. The decision of the United States District Court for the Northern District

of California is attached thereto as Appendix "A" and the Memorandum Decision of the United States Court of Appeals for the Ninth Circuit is attached thereto as Appendix "B".

JURISDICTION

The complaint filed in the District Court was brought under 42 U.S.C. §§1982, 1983, and 1985 (3) and charged that Respondents conspired with each other to damage the business organization owned by Petitioners thereby depriving them of their civil rights. The District Court dismissed the complaint on the ground that it was barred by the Statute of Limitations. Petitioners filed a timely Notice of Appeal to the United States Court of Appeals for the Ninth Circuit which affirmed the decision of the District Court. Thereafter, Petitioners filed their timely Petition for a Writ of Certiorari.

QUESTION PRESENTED

Is Petitioners' alleged claim barred by the admittedly applicable California three year Statute of Limitations?

STATEMENT OF THE CASE

Petitioners have provided the Court with a detailed summary of their thirty page complaint, as well as the other pleadings and documents on which they rely.

The main thrust of the complaint is that the Respondents wrongfully conspired to invoke the bankruptcy laws of the United States against Dudley Industrial Corporation which was substantially owned by Petitioners. The purpose of the alleged conspiracy was to eliminate Dudley Industrial Corporation from the field of polyester fiberglass reinforced fixture market. Petitioners alleged the conspiracy is continuous and that the damage suffered by them, together with the relief they sought from the consequences of 1961 bankruptcy of Dudley Industrial Corporation, prevents their claim from being barred by the Statute of Limitations.

ARGUMENT

The last overt act of the Respondents set forth in the complaint occurred in 1961. Petitioners have tried unsuccessfully to circumvent the Statute of Limitations which is admittedly three years. California Code of Civil Procedure, §338(1): *Donovan v. Reinhold*, 433 F.2d 738 (9th Cir. 1970). They make three separate arguments which are set forth in their Petition as the second, third, and fourth Questions Presented. (Petition for Writ of Certiorari, at pp. 2-4) Petitioners' first question is answered in the subsequent arguments. Petitioners' second question relates to the two legal proceedings wherein Petitioners sought relief from the alleged conspiracy. Petitioners filed a successful action against the Internal Revenue Service for refund of federal taxes (*Dudley v. U. S.*, 428 F.2d 1196 (9th Cir. 1970) and Petitioner Robert G. Dudley unsuccessfully sought a *Coram Nobis* Peti-

tion to the State Court in California to relieve him from a criminal conviction for the non-payment of employer taxes. Petitioners' third question relates to their pleading that the Internal Revenue Service was a co-conspirator, although they did not name the Internal Revenue Service as a defendant. Petitioners' fourth question relates to their invocation of the Federal Fraudulent Concealment Rule because one of the petitioning creditors in the bankruptcy proceeding was mistakenly designated as a California corporation, when in fact it was a Delaware corporation. These same arguments were unsuccessfully presented to the United States Court of Appeals for the Ninth Circuit.

Bank of America National Trust and Savings Association wishes to point out that the law on these points was fully argued to the Court of Appeals. No significant new authorities have been brought forth by Petitioners. Therefore, Bank of America National Trust and Savings Association incorporates by reference as Appendix "A" its Brief to the Court of Appeals, both for its statement of law and in support of its contention that the Court of Appeals had the benefit of Petitioners' arguments being fully presented.

More importantly, Petitioners' mere assertion that the decision below is not in harmony with other Circuits and in disregard of this Court's decisions involving the Federal Fraudulent Concealment Rule should be tested against the intent of the Court's Rule Nineteen. A review on Writ of Certiorari is not a

matter of right, but of sound judicial discretion. ***Fay v. Noia,*** 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (N.Y. 1963). Petitioners' complicated claim raises no important questions of federal law which must be decided by the Court. "Special and important reasons", within this rule relating to granting of *certiorari*, relate to problems beyond the academic or episodic, especially where issues involved reach constitutional dimensions. ***Rice v. Sioux City Memorial Park Cemetery,*** 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (Iowa 1955). Here both the District Court and the Court of Appeals have commented that they had grave doubt as to whether Petitioners have even stated a claim upon which relief can be granted. Certainly this is not the type of case which requires this Court's intervention. Finally, Petitioners have made no substantial showing that the decision of the Court of Appeals is in conflict with other Circuits or with this Court's decision.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated, San Francisco, California,
February 18, 1975.

Respectfully submitted,
ELDON C. PARR,
Attorney for Respondent Bank of America National Trust and Savings Association.

(Appendix "A" Follows)

Appendix "A"

No. 73-1198

United States Court of Appeals

For the Ninth Circuit

ROBERT G. DUDLEY and MARI A. DUDLEY,
Plaintiffs-Appellants,

vs

D. DEJERSEY GRUT; BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION; THE FIRST NATIONAL BANK OF SAN JOSE; COAST MANUFACTURING CO.; FIRESIDE THRIFT CO.; REICHHOLD CHEMICAL CO.; aka RICHHOLD CHEMICAL CO.; JOHN DOE I through X and RICHARD ROE CORPORATIONS, I through X,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California

BRIEF OF APPELLEE BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

WILLIAM S. MACKAY,
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IV

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No. 73-1198

United States Court of Appeals
For the Ninth Circuit

ROBERT G. DUDLEY and MABI A. DUDLEY,
Plaintiffs-Appellants,

vs.

D. DEJERSEY GRUT; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION; THE FIRST NATIONAL BANK OF SAN JOSE; COAST MANUFACTURING CO.; FIRESIDE THRIFT CO.; REICHHOLD CHEMICAL CO.; aka RICHHOLD CHEMICAL CO.; JOHN DOE I through X and RICHARD ROE CORPORATIONS, I through X,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California

BRIEF OF APPELLEE BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

STATEMENT OF THE CASE

Plaintiffs have brought suit under the provisions of the Federal Civil Rights Act, specifically 42 U.S.C. §§1982, 1983 and 1985(3), against defendant Bank of America National Trust and Savings Association, a national banking association (hereinafter called Bank),

and the co-defendants alleging a conspiracy to interfere with various business interests of the plaintiffs. Upon motion by defendants, the Court dismissed the complaint on the grounds that the complaint was untimely under the applicable statute of limitations. Plaintiffs have appealed from this dismissal.

The main thrust of the complaint is that the defendants wrongfully conspired to invoke the bankruptcy laws of the United States against Dudley Industrial Corporation, which was substantially owned by the plaintiffs. The purpose of the alleged conspiracy was to eliminate Dudley Industrial Corporation from the field of the polyester fiberglass reinforced fixture market. Plaintiffs' argument on appeal is that the alleged conspiracy is continuous and the damages suffered by them, together with the relief they sought from the consequences of the 1961 bankruptcy of Dudley Industrial Corporation, prevent their claim from being barred by the statute of limitations.

The complaint sets forth three major sets of allegations. The first set relate the organization and the success of plaintiffs' business activities prior to June 1960. The second set relate to the alleged activities of the defendants beginning in 1960 which included the exclusion of the plaintiffs from the management of Dudley Industrial Corporation and resulted in the involuntary bankruptcy proceedings begun in September of 1960. The third set of allegations relate to the difficulties suffered thereafter by the plaintiffs, particularly plaintiff Robert G. Dudley. These difficulties included a penalty assessment against him for non-

payment of social security taxes due, and proceedings against him by the State Labor Department for non-payment of wages ending in a criminal conviction in 1961. The last overt act of any of the defendants was alleged to have occurred in 1961.

QUESTIONS INVOLVED

(1) Did the District Court correctly dismiss the complaint as being untimely under the appropriate statute of limitations?

(2) If not barred by the statute of limitations, does the complaint state a claim on which relief can be granted?

ARGUMENT

I

THE DISTRICT COURT WAS REQUIRED TO DISMISS THE COMPLAINT BASED ON THE RECORD BEFORE IT

The dismissal of the complaint herein was proper based on the statute of limitations because the complaint shows on its face that the overt acts alleged occurred more than ten years ago. *Suckow Borax Mines Consolidated v. Borax Consolidated*, 185 F.2d 196, 204 (9th Cir., 1950) cert. denied, 340 U.S. 943 (1951). Further, the complaint does not state a claim upon which relief can be granted under the Federal Civil Rights Act because at most plaintiffs allege a private conspiracy against rights which are not protected by the Federal Constitution.

II

THE APPROPRIATE STATUTE OF LIMITATIONS IS THREE YEARS AND RUNS FROM THE LAST OVERT ACT OF THE DEFENDANTS FROM WHICH DAMAGE CAN RESULT.

The Federal Civil Rights Act contains no statute of limitations. When this occurs it is well settled that state law controls. *O'Sullivan v. Felix,* 233 U.S. 318 (1914), *Morgan v. Kock,* 419 F.2d 993 (1969), *Baker v. F & G Investment,* 420 F.2d 1191 (1970). The appropriate statute of limitations for a federal civil rights action under California law is three years. C.C.P. §338(1). *Smith v. Cremins,* 308 F.2d 187 (9th Cir. 1962), *Donovan v. Reinhold,* 433 F.2d 738 (9th Cir. 1970), *Mills v. Small,* 446 F.2d 249 (9th Cir. 1971).

Where a civil conspiracy is alleged under the Federal Civil Rights Act the statute of limitations begins to run from the last possible date on which there is an overt act on the part of the defendants from which damage can flow. *Hoffman v. Halden,* 268 F.2d 280 (9th Cir. 1959). The mere allegation of a continuous conspiracy is insufficient to avoid the statute of limitations, *Lambert v. Conrad,* 308 F.2d 571 (9th Cir. 1962).

III

THE RELIEF GRANTED THE PLAINTIFF IN ROBERT G. DUDLEY v. U. S., 428 F.2d 1196 (9th Cir. 1970) DOES NOT CONSTITUTE AN OVERT ACT OF THE DEFENDANTS FROM WHICH DAMAGE CAN RESULT.

The federal suit filed by Robert G. Dudley which resulted in his relief from a tax penalty in 1970 is

not material for the purposes of determining when the statute of limitations starts. A careful reading of *Dudley v. U. S., supra,* shows that the key element of the penalty proceeding is the willful failure to pay federal taxes and a "voluntary, conscious and intentional action to prefer other creditors of the corporation over the United States." The Court looked to the fact that the plaintiff, while in control of Dudley Industrial Corporation, had made a substantial effort to pay the taxes which were due. The Court points out that plaintiff had drawn a check in favor of the United States and mailed it to the Internal Revenue Services on May 1, or May 2, 1960. The check was not presented for payment until June 10, 1960 when it was refused payment because of insufficient funds. Plaintiff was not found to have actual notice of the dishonor until July 1960 by which time he was replaced as the responsible officer of the corporation. Plaintiff had, therefore, complied with the federal tax law and had not preferred another creditor over the United States while he was in control of the corporation's finances. Nowhere in the case is there any indication that the defendants had acted wrongfully in dealing with the corporation or that any act was committed by them after 1961. Therefore, for the purposes of tolling the statute of limitations, *Dudley v. U. S., supra,* did not constitute an overt act of the defendants from which further damage to the plaintiffs could result.

Plaintiffs argue that based on *Savage v. U. S.,* 450 F.2d 449 (8th Cir. 1971) the statute of limitations

did not run until after the favorable decision in *Dudley v. U. S., supra,* on the grounds that such a favorable decision is somehow necessary to complete the required elements of their present claim. *Savage v. U. S., supra,* involved a claim under the Federal Civil Rights Act which alleged a wrongful violation of plaintiff civil rights resulting from malicious prosecution. It is hornbook law that one of the required elements needed to maintain a cause of action for malicious prosecution is that the plaintiff has received a favorable judgment which is final. *Savage v. U. S., supra,* is distinguishable from this case on the grounds that malicious prosecution was a common law tort and the plaintiffs' claim is based solely on statute. *Lambert v. Conrad, supra,* and *Hoffman v. Halden, supra.* Plaintiff's effort to minimize the consequences of the bankruptcy was not an overt act of the defendants from which further harm could occur.

IV

PLAINTIFF'S CORAM NOBIS PROCEEDING WAS NOT AN OVERT ACT OF THE DEFENDANTS FROM WHICH HARM COULD RESULT.

Plaintiff stated that he was convicted in the Municipal Court for San Jose-Milpitas Judicial District, County of Santa Clara, State of California, in 1961. The conviction was final at that time. In 1971 plaintiff petitioned the State Court for a writ of error *coram nobis* urging his conviction be set aside. The basis for his petition was that the Federal Court

found him not to be in control of the Dudley Industrial Corporation at the time the federal taxes were due in 1960. Since plaintiff was not liable for federal tax penalty he argued he was not liable for 1960 wages which resulted in his conviction. This argument fails for the same reason as the last. The relief sought by plaintiff was not an act of the defendants from which damage or harm could result to plaintiff. The damage, if any, occurred in 1961 when the plaintiff was convicted. Were the Court to accept plaintiff's theory, the Court would effectively allow the plaintiff to avoid the statute of limitations simply by initiation of a separate Court proceeding which is, in essence, a collateral attack on a prior judgment.

V

THE FEDERAL FRAUDULENT CONCEALMENT RULE IS NOT APPLICABLE BECAUSE IT IS IMMATERIAL IN THIS PROCEEDING WHETHER A PETITIONING CREDITOR IN THE LONG SINCE CONCLUDED BANKRUPTCY ACTION IS A DELAWARE CORPORATION QUALIFIED TO DO BUSINESS IN CALIFORNIA RATHER THAN A CALIFORNIA CORPORATION AS ALLEGED IN THE BANKRUPTCY PETITION.

The federal fraudulent concealment rule states simply that the time period does not begin to run for the purposes of the statute of limitations until the defrauded party has or should have had knowledge of the facts. *Baily v. Glover*, 88 U.S. 342 (1867). It has been re-stated more recently as one who conceals material facts and thereby prevents the discovery of his wrong, or the fact that a cause of action has accrued against him, is not permitted to assert the

statute of limitations as a defense for the period of concealment. *Kansas City, Missouri v. Federal Pacific Electric Co.*, 310 F.2d 271 (8th Cir. 1962).

Plaintiffs claim that the federal fraudulent concealment rule is applicable because after the filing of their complaint the plaintiffs discovered that a petitioning creditor in the 1960-1961 bankruptcy proceeding was mistakenly identified as a California Corporation when, in fact, it was a Delaware Corporation which was qualified to do business in California.

There are four reasons why this rule is not applicable. The first is that the actual place of corporate domicile was of little significance in the bankruptcy proceeding. The heart of the bankruptcy proceeding was the indebtedness of Dudley Industrial Corporation to the creditors. This has not been denied. Secondly, the actual record of the corporate domicile would be a matter of public record having been filed with the California Secretary of State's office. (See plaintiff's Exhibit "E" TR. 155). Thirdly, the plaintiff consented to the bankruptcy. (TR. 209). Fourth, the alleged concealment does not meet the test of materiality with regard to his present claim against the defendants herein. In order to invoke the federal fraudulent concealment rule the plaintiffs must affirmatively show that there was a concealment of a substantial element of his claim or of the entire claim itself. *Moviecolor Limited v. Eastman Kodak Company* 288 F.2d 80 (2nd Cir. 1961), cert. denied in 368 U.S. 821. *Laundry Equipment Sales Corp. v. Borg-Warner Corp.*, 334 F.2d 788 (7th Cir. 1964).

VI

EVEN IF THE COMPLAINT IS NOT BARRED BY THE STATUTE OF LIMITATIONS, THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE FEDERAL CIVIL RIGHTS ACT.

The District Court dismissed the complaint on the grounds that it was barred by the statute of limitations. The Court did not decide whether the complaint stated a claim upon which relief could be granted. Plaintiffs, however, have argued extensively in their brief that the complaint states a claim upon which relief can be granted. Bank desires to answer the plaintiffs' arguments on this question briefly. Bank requests that if the Court finds that the statute of limitations is not a bar to the complaint that all parties be allowed the opportunity to fully argue the question before this Court or in the alternative that the matter be referred back to the District Court for further proceedings.

VII

NO CLAIM IS STATED UNDER SECTION 1982 OF THE FEDERAL CIVIL RIGHTS ACT BECAUSE NO RACIAL OR OTHER INVIDIOUS DISCRIMINATION IS ALLEGED.

The act provides in 42 U.S.C. §1982 as follows:

> "All citizens of the United States shall have the same rights in every State and Territory as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property."

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) the Supreme Court held that §1982 dealt only

with racial discrimination. This position was reaffirmed the next year in *Sullivan v. Little Hunting Park,* 396 U.S. 229 (1969) which concerned racial discrimination in housing.

Plaintiffs argue on appeal that the broad language used in *Griffen v. Breckenridge,* 403 U.S. 88, 91 S.Ct. 1791 (1972) should be applied to §1982. They acknowledged that *Griffen v. Breckenridge, supra,* dealt with an interpretation of §1985(3) which contains significantly different language than §1982 but base their argument on the legislative history of the entire civil rights legislation. Even if the Court were to look for a class-based, invidiously discriminatory animus as discussed in *Griffen v. Breckenridge, supra,* it would be impossible to place the plaintiffs in such a class. First, the plaintiffs have sued herein as individuals. They have not alleged that they represent a class of persons discriminated against nor have they claimed to represent all of the shareholders of Dudley Industrial Corporation. Secondly, the motive that is alleged for the actions of the defendants is stated to be that the defendants intended to drive Dudley Industrial Corporation out of the polyester fiberglass reinforced fixture market. This motive cannot reasonably be held to be within the purview of the civil rights legislation. The allegations, if true, would only constitute an improper business practice.

VIII

NO CLAIM IS STATED UNDER SECTION 1983 OF THE FEDERAL CIVIL RIGHTS ACT BECAUSE THE COMPLAINT FAILS TO ALLEGE STATE ACTION AND A DEPRIVATION OF A FEDERALLY PROTECTED RIGHT, PRIVILEGE OR IMMUNITY WITHIN THE MEANING OF THE STATUTE.

The act provides in 42 U.S.C. §1983 as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The Courts have held that the phrase "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" to mean there must be some state action to bring the conduct of the defendants within the meaning of this section of the act. *Palacios v. Foltcz,* 441 F.2d 1196 (10th Cir. 1971). Plaintiffs have attempted to show state action by relying on alleged acts of co-conspirators none of whom we named as co-defendants.

The City of Hollister and the County of Riverside are alleged to be co-conspirators with the defendants. Their conduct which is alleged to be state action consists of the cancellation of certain leases owned by Dudley Industrial Corporation and the permitting of a take-over of these leases by the trustee in bank-

ruptcy. These actions are proprietory actions which any property owner might have taken. The fact that the lessors were governmental entities is purely fortuitous. There must be more than a casual relationship between the state power and the alleged misuse of power. The misuse of power must be possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. *United States v. Classic,* 313 U.S. 299, 326 (1941) quoted with approval in *Monroe v. Pape,* 365 U.S. 167, 183-187 (1960).

Plaintiff's second theory of state action relates to the plaintiff's criminal conviction in the State Court for failure to pay wages. Defendant Grut is alleged to have supplied information to the Santa Clara District Attorney in order to bring about the plaintiff's prosecution. Where the defendants are private persons, it is necessary to show that the private persons acted "under color of law" either through a conspiracy with state officials or with sufficient state action to prove a violation of the plaintiff's Fourteenth Amendment rights. *Adickes v. Kress & Co.* 398 U.S. 144, (1970). Plaintiffs did not allege that the Santa Clara District Attorney was a co-conspirator. Neither did they allege that the state's application of the provisions of the California law discriminated against them. Lastly, the plaintiff has not alleged any state involvement in the precise object of the conspiracy. Therefore, the plaintiffs have not met the criteria for state action within the meaning of §1983 *Mullarkey v. Borglum,* 323 F.Supp. 1218 (S.D. N.Y. 1970).

The complaint also fails to meet the requirement of §1983 that there be a deprivation of a federally protected right, privilege or immunity. Plaintiffs claim that the defendants conspired to deprive them of their "constitutional right to engage in lawful business without interference . . ." (TR. 29, lines 18-25). It has been clear since the decision in the *Slaughter-House Cases,* 83 U.S. 36 (1872), that this type of right is not covered by §1983. That decision arose out of suits brought against the State of Louisiana, which had passed an act restricting the carrying on of the slaughterhouse business in a given geographical area to a small number of firms. The plaintiffs in that case argued that the ability to carry on the lawful business of a slaughterhouse, and, in fact, that the right to engage in any lawful endeavor, was one of the privileges and immunities secured by the Federal Constitution. The Supreme Court drew a distinction between the rights of state citizenship and the rights of national citizenship secured by the Federal Constitution, and held that the right to engage in business was not a right secured by the Federal Constitution. This view was followed by Mr. Justice Stone in a concurring opinion in *Hague v. C.I.O.,* 307 U.S. 496, 520 n.1 (1939), and in *Madden v. Kentucky,* 309 U.S. 83 (1940). *Glicher v. Michigan Liquor Control Commission,* 160 F.2d 96 (6th Cir. 1947), involved the revocation of a liquor license. The plaintiff unsuccessfully asserted that his rights, privileges and immunities under the Federal Constitution had been violated.

Plaintiffs cite *Griffen v. Breckenridge, supra,* for the argument that the rights, privileges or immunities protected by §1983 include the right to do business, which the plaintiffs have alleged they were deprived of by defendants. However, *Griffen v. Breckenridge, supra,* dealt with §1985(3), not with §1983. It did not modify the holdings that the rights, privileges or immunities protected by §1983 do not include the right to do business.

IX

NO CLAIM IS STATED UNDER § 1985 (3) OF THE CIVIL RIGHTS ACT BECAUSE PLAINTIFFS DO NOT FORM A CLASS TO BE PROTECTED FROM INVIDIOUS DISCRIMINATION.

The act provides in 42 U.S.C. §1985(3) as follows:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure

> any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

In *Griffen v. Breckenridge, supra,* the Supreme Court examined extensively the Congressional intent behind §1985(3). The Court found that §1985(3) was not intended to apply to all tortious activity or conspiratorial interferences with the rights of others, nor was it intended to punish any assault and battery committed by two or more persons. The Court determined that there must be more; there must be "as an element of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the amendment." 403 U.S. at 102. Thus, in construing the statute, the Court held that:

> "The language requiring intent to deprive of *equal* protection or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102.

Plaintiffs have not alleged that they are members of any class on the basis of which they have been dis-

criminated against by defendants. As discussed with reference to §1982 plaintiffs have not shown themselves to be part of a class but rather are individuals alleging an improper business conspiracy.

CONCLUSION

Bank respectfully submits that the judgment of dismissal based on the statute of limitations was proper and that even if the statute of limitations were not a bar to the plaintiffs' action, the complaint fails to state a claim upon which relief can be granted. For the above stated reasons the judgment of dismissal should be affirmed.

Dated, San Francisco, California,
May 3, 1973.

WILLIAM S. MACKAY,
ROBERT A. PADWAY,
THEODORE SACHSMAN,
By THEODORE SACHSMAN,
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